In The

Supreme Court of the United States

October Term, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Third Circuit

MEMORANDUM IN LIEU OF BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Teamsters Local 676, requests this Court to consider this Memorandum in Lieu of Brief in Opposition to Petition for a Writ of Certiorari filed by Petitioner, Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz.

I FEDERAL JURISDICTION DOES NOT EXIST IN THIS MATTER

This matter was initially brought before the United States District Court for the District of New Jersey predicated upon federal jurisdiction allegedly existent under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. The United States Court of Appeals for the Third Circuit in Footnote 5a to its Opinion, noted it believed jurisdiction existent under 28 U.S.C. § 1331. The Court of Appeals did not discuss whether jurisdiction was existent under § 1337. It is submitted, however, serious questions exist as to whether, in fact, federal jurisdiction is present in this matter as alleged by Petitioner. The United States Court of Appeals Second Circuit has had occasion to consider the matter involving welfare benefits to strikers. *Russo v. Kirby*, 453 F.2d 540 (2nd Cir., 1971). In that case, the Second Circuit was faced with a situation wherein

a labor union brought suit against certain New York state officials requesting that striking employees be granted welfare benefits. The United States District Court considered the matter on its merits. The Second Circuit, however, reversed finding that jurisdiction did not exist under Section 1331 or 1337. The Court held that no 1337 jurisdiction was existent since the facts involved in the dispute were insufficient to conclude that there was a federal cause of action present under any federal law. Additionally, the Court held that there was no jurisdiction under 1331 since no individual claim of the striking employees exceeded $10,000 and aggregation of all claims of all striking employees was impermissable. The Court cited *Snyder v. Harris*, 394 U.S. 332 (1969) It is respectfully suggested that the decision of *Russo v. Kirby* is equally applicable to the dispute here and that jurisdiction does not lie under any federal statute and that therefore a Writ of Certiorari should not be granted in this matter.

II THE CASE BEFORE THE COURT IS MOOT AND THEREFORE THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Petitioner argues that this matter has not been mooted by the passage of time. However, factually it is undisputed that the strike giving rise to the granting of welfare benefits ended before the trial court completed its action in dismissing the case. The trial court acted under the authority of the Decision of the United States Court of Appeals for the First Circuit in *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir., 1970) cert. denied 402 U.S. 933 (1971). Indeed in this matter Teamsters Local 676 alleged that the strike terminated prior to the hearing being held before the United States District Court on the Employer's request for injunctive relief (See Petitioner's Appendix at Page A-3). It is, therefore, factually clear at the time of the important parts of this matter, that the strike which had given rise to the case, was over and that employees were about to return to work. It is, therefore, suggested that factually, therefore, Employer Petitioner is seeking review in a case which cannot be considered viable under any circumstances since no one was any

longer on strike nor any longer receiving welfare benefits at crucial times of the initial litigation. The Employer Petitioner argues strongly that the case herein involved is of extreme importance and that the test should be "whether the question presented is an important one, which, unless resolved, is likely to recur." (Petition for Writ of Certiorari Page 6). It is submitted that this is not the proper test of whether, in fact, a case is moot within the meaning of the case or controversy provision of the United States Constitution which gives rise to United States court jurisdiction. The issue is whether, in fact, there are parties who actually have between them a real dispute existent at the time the case is being decided by a court. The test of mootness, as proposed by the Employer, is simply a lifting of a rationale articulated in a 1911 case before the United States Supreme Court. See, *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). It is submitted that the comments made in that case relative to whether a dispute is "capable of repitition yet evading review" is not the proper test for determining mootness; rather it is submitted that when the immediate dispute between the parties is ended because the challenged activity has ceased, then mootness sets in. The United States Court of Appeals for the Third Circuit so recognized that the activity here in dispute, receipt of welfare benefits by employees during an economic strike, had in fact terminated while the District Court litigation was occurring thus making the matter moot. In support of the Court of Appeals conclusion, the Court cited *Oil Workers Local 8-6 v. Missouri*, 361 U.S. 363 (1960). It is submitted that this case is the proper precedent and sets out proper mootness precedent in a case involving a labor dispute. There, the underlying labor dispute giving rise to the challenged state action had already been resolved.

Also on point in this regard is the case of *Street Employees Division v. Missouri*, 374 U.S. 74 (1963). That case too viewed the dispute as viable only if the underlying labor dispute giving rise to the challenged state action had not been ended. It is submitted that the *Oil Workers* case and the *Street Employees Division* case clearly spell out applicable principles of mootness which must be applied to the facts of this case. Particularly appropriate are the comments of Mr. Justice Stewart delivered in the *Oil Workers* case wherein he cited from the case of *Brownlow v. Schwartz*, 261 U.S. 216:

"Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate and if affirmed would ostensibly require something to be done which had already taken place. A reversal would ostensively avoid an event which had already passed upon recall. One would be as vain as another. To adjudicate a cause which no longer exists is a proceeding which this court has uniformly declined to entertain.'"

8-6 Oil Workers v. Missouri,
361 U.S. 363 at 371

It is, therefore, respectfully suggested that a Writ of Certiorari should not be granted in this matter.

III A GRANT OF WRIT OF CERTIORARI IS INAPPROPRIATE AT THE CURRENT TIME

The matter before the Court is one involving a subject matter inappropiate for review at the current time. The United States Department of Health, Education and Welfare has currently under consideration various alternative proposed regulations to deal with the question of welfare benefits for striking employees. The Department of Health, Education and Welfare proposed several alternate regulations and invited public comment on same. Those alternate proposals are set forth at 45 CFR Part 233. A copy of same is attached hereto.

The Health, Education and Welfare Department has received public comments on these regulations and is currently considering which of its alternatives it will be codifying and promulgated. The proposals have been made as a result of the suggestion of the Decision in the case *Francis v. Davidson*, 340 F. Supp. 351 (D. Maryland), Affirmed Per Curiam, 409 U.S. 904 (1972). That case, too, involved a determination as to whether striking employees are entitled to welfare benefits and the Three Judge District Court deciding the matter was of the Opinion that the striking employees were entitled to welfare benefits

In view of these recent developments by the Health, Education and Welfare Department, it is respectfully suggested that

the current time is particularly inappropriate for the Court to grant the petition for a Writ of Certiorari.

Respectfully submitted,
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
Attorneys for Respondent Local 676
By: Robert F. O'Brien

PROPOSED RULE MAKING
Social and Rehabilitation Service
(45 CFR Part 233)
COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS
Dependent Children of Unemployed Fathers

Notice is hereby given that the regulation set forth in tentative, alternative form is proposed by the Administrator, Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare. Both alternatives would amend § 233.100 (a) (1), which provides a Federal definition of unemployed father under the AFDC program in terms of hours of work.

In applying the existing regulation, the Department policy has been to permit a State, at its option, to use a definition of unemployed father which imposes additional conditions relating to the reason for the unemployment, e.g., the State definition might exclude a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law. In Davidson v. Francis, the Supreme Court on October 16, summarily affirmed the judgement of the district court which held, in effect, that while the Secretary has broad authority to define an unemployed father for purposes of section 407 of the Social Security Act, the existing Federal regulation provides only an hours-of-work test, and thus prohibits a State from excluding fathers who meet this test but are disqualified for unemployment compensation.

Accordingly, the proposed alternative A below would amend the regulation to make the prior Department policy explicit, by stating the options which are permitted to the States in defining

an unemployed father. Alternative B, on the other hand, would amend the regulation to make clear that the hours-of-work test is intended as the exclusive definition of unemployed father, so that States may not have definitions which impose added conditions. This would be a change in Department policy, but would be consistent with the way that the existing regulation has been interpreted by the courts.

Davidson v. Francis attracted broad interest from States, assistance recipients, and industry and labor groups. The regulations are proposed in alternative form to give all those who are interested full information as to the various courses of action which are being considered.

Prior to the adoption of the proposed regulation, consideration will be given to any comments, suggestions or objections thereto which are submitted in writing to the Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare, 330 Independence Avenue SW., Washington, DC 20201, within a period of 30 days from date of publication of this notice in the FEDERAL REGISTER. Comments received will be available for public inspection in room 5120 of the Department's offices at 301 C Street SW., Washington, DC, on Monday through Friday of each week from 8:30 to 5 p.m. (area code 202—963-7361).

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Dated: December 4, 1972

JOHN D. TWINAME,
Administrator, Social and Rehabilitation Service.

Approved: December 21, 1972.

ELLIOT L. RICHARDSON,
Secretary.

ALTERNATIVE A

Section 233.100 (a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§233.100 Dependent children of Unemployed fathers

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the 2 prior months and is expected to be under tthe standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

ALTERNATIVE B

Section 233.100 (a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§ 233.100 Dependent children of unemployed fathers

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in §233.20 and shall include any father who:

(i) Is employed less than 100 hours a month, or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hours standard for the 2 prior months and is expected to be unkler the standard during the next month.

This shall be the exclusive definition of an unemployed father.

(FR Doc. 73-33 Filed 1-2-73, 8:45 A.M.)

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Respondents.

REPLY TO MEMORANDUM IN OPPOSITION OF TEAMSTERS LOCAL 676

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REPLY TO MEMORANDUM IN OPPOSITION OF TEAMSTERS LOCAL 676

The memorandum is submitted to show the error of the various contentions made by Respondent Teamsters Local 676 in its memorandum in opposition:[1]

1. The public respondents, by letter dated June 15, 1973, advised the Clerk of the Court that they did not intend to file a brief in opposition.